

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

_____	)	
ELOUISE PEPION COBELL, <u>et al.</u> ,	)	
	)	
Plaintiffs,	)	No. 1:96CV01285
v.	)	(Judge Lamberth)
	)	
GALE A. NORTON, Secretary of	)	
the Interior, <u>et al.</u> ,	)	
	)	
Defendants.	)	
_____	)	

**DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR  
LEAVE TO FILE A SURREPLY IN OPPOSITION TO PLAINTIFFS'  
MOTION TO COMPEL DEPOSITION  
TESTIMONY OF ANSON BAKER AND REQUEST FOR SANCTIONS**

Plaintiffs do not dispute that the issue of the referral of Justice Department attorneys to the District Court's Committee on Grievances was not raised in their Motion to Compel Deposition Testimony of Anson Baker And Request for Sanctions, or in Defendants' Opposition, but instead appeared for the first time in their Reply. Plaintiffs also do not dispute that the issue of the referral had no relevance to the underlying motion. Indeed, they readily concede that their mention of the referral provided no legal theory explaining the connection between the referral and the testimony sought from Mr. Baker. Plaintiffs' Opposition to Defendants' Motion for Leave to File a Surreply ("Plaintiffs' Opposition") at 3-4.

Under these circumstances, one might understandably wonder why the referral was even mentioned in their Reply. The real reason that Plaintiffs raised the issue of the referral seems obvious to Defendants: when confronted with a well-reasoned, persuasive opposition to which Plaintiffs had no reply, they resorted to their usual base and degrading tactic of tarring the messenger. Plaintiffs accuse Defendants' counsel of being "ethically challenged." Plaintiffs'

Opposition at 2. Defendants do not dispute that Plaintiffs have challenged, *ad nauseam*, the ethics of Defendants' counsel in this litigation. The point missed by Plaintiffs is that the challenges are meritless. To ensure that the record is complete Defendants should be permitted to respond to the new issue raised in Plaintiffs' Reply. See Ben-Kotel v. Howard Univ., 319 F.3d 532, 536 (D.C. Cir. 2003); see also United States v. Diabetes Treatment Centers of America, Inc., 238 F. Supp. 2d 270, 277 (D.D.C. 2002) ( "A surreply is most appropriate where the new matter introduced is factual." ).<sup>1</sup>

The bulk of Plaintiffs' Opposition contains an attack on the investigation – and, of course, its outcome – conducted by the Committee on Grievances in response to the Court's referral. These complaints have no place in this dispute. Plaintiffs' concerns about how the Committee conducted its business should be directed to the Committee, and Defendants will not address them here. The facts are indisputable. The Committee received a complaint from the Court; the Committee investigated the complaint; the Committee issued letters to each of the subjects of the referral indicating that the complaint had been discharged and that the matter is now closed. The basis for Defendants' Motion for Leave to File a Surreply is simple: Because Plaintiffs raised the issue of the referral for the first time in their Reply, Defendants should be permitted to file a surreply which sets forth the outcome of the referral.<sup>2</sup>

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<sup>1</sup> Plaintiffs' Opposition does not contain a proposed order, as required by LCvR 7(c), and thus Defendants' Motion should be treated as unopposed. See Order of January 27, 1999, at 2 (Dkt. 200); Order of December 21, 1998, Note to Counsel (Dkt. 185).

<sup>2</sup> Plaintiffs purport to "reserve their right to oppose" any surreply. Plaintiffs' Opposition at 5 n.12. Because the filing of any paper after a reply requires leave of Court, this reservation of a nonexistent "right" is a nullity.

## **CONCLUSION**

For these reasons, Defendants' Motion should be granted and Defendants' Surreply should be accepted for filing.

Dated: June 17, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on June 17, 2004 the foregoing *Defendants' Reply in Support of Motion for Leave to File a Surreply in Opposition to Plaintiffs' Motion to Compel Deposition Testimony of Anson Baker and Request for Sanctions* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

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